APR 22 1974
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1580

FREDDIE L. WELLS, Petitioner,

v.

JAMES F. HENNESSEY, Judge
Berea, Ohio, Municipal Court
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF OHIO

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PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF OHIO

Petitioner Freddie L. Wells respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Ohio, entered January 23, 1974.

Opinion Below

The opinion of the Supreme Court of the State of Ohio appears at 37 Ohio State 2d 37, and is reproduced in the Appendix to this petition.

The judgment of the Court of Appeals for the Eighth Appellate District of Ohio was issued without opinion, and was not reported. That judgment is reproduced in the Appendix to this petition.

Jurisdiction

The judgment of the Supreme

Court of the State of Ohio was entered on January 23, 1974. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(3).

Questions Presented

1. What are the constitutionally proper criteria for classifying defendants, with respect to indigency and means, for the purpose of determining who shall be appointed counsel?

2. If constitutionally acceptable criteria for determining indigency cannot be clearly established, does a defendant in a criminal case, who has not sought to establish that he is indigent, have a right to appointed counsel?

Constitutional Provisions Involved

Constitution of the United States of America:

Amendment Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment Article XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner was charged with assault and battery, such charge carrying a possible penalty of imprisonment upon conviction. Before any procedural steps were taken in that action, petitioner filed a motion with respondent for appointed counsel. Petitioner sought appointed counsel as a matter of equal protection of the law since other defend-

ants in misdemeanor criminal actions had been furnished counsel by the courts at no cost to them, and he should have the same rights, as a citizen, as they do.

Respondent denied petitioner's motion, and an appeal from such denial was dismissed as not being a final appealable order.

Petitioner then sought mandamus from the Court of Appeals for the Eighth Appellate District of Ohio, seeking an order directing respondent to appoint counsel for petitioner. That court denied the petition for writ of mandamus, and petitioner appealed to the Supreme Court of Ohio. That court, in an opinion and judgment dated January 23, 1974, affirmed the judgment of the lower court in a per-curiam opinion, and petitioner seeks

review in this Court.

No trial record exists in this case, the matter having been submitted to the lower courts and heard upon petitioner's petition for writ of mandamus.

Reasons for Granting the Writ

1. The decision below fails to give effect to the scope and spirit of the Equal-Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America, as interpreted by this Court.

The Fourteenth Amendment to the Constitution of the United States is clear in its commands that "No State shall . . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added)

The denial of petitioner of appointed

counsel, without respect to indigency, causes petitioner to assume the status of one in a disfavored class. That class comprises those who have been diligent or lucky enough to have amassed some means, and unfortunate enough to have run afoul of the law; it may also include those who are too proud to admit to a lack of funds.

The state has no business in attempting to trim one of its citizens down to the size of another, or in meting out punishment, whether legal or fiscal, based on either affluence or indigency.

> The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. Miranda v. Arizona, 384 US 436, 472 (1966) (per Warren, C.J.) (emphasis added).

Of course, the quotation given here was taken out of context. But the point sought to be made is that the Constitution does not provide that the indigent may be given a favored place over the affluent.

The State cannot make every person a Henry Aaron or a Marian Anderson; not every person has the same degree of wealth or skill. By the same token, the State cannot, as a practical matter, shoehorn all of its citizens into the same mold. It can only treat all of its citizens as being equal in the eyes of the law.

This Court has held that counsel must be appointed for indigents in felonies, Gideon v. Wainwright, 372 US 335 (1963), and for indigents in misdemeanor cases, Argerslinger v. Hamlin, 407 US 25 (1972). While the purpose in

these decisions was that of ensuring adequate representation for defendants unable to afford to hire their own attorneys, the net effect has been to provide counsel for the rich and the poor, but to deny it as a practical matter to the middle class.

The well-to-do defendant has adequate means to hire the attorney of his choice, and a high probability of contacts which will put him in touch with a competent criminal attorney. The indigent defendant is accorded the assistance of counsel who, while not necessarily highly experienced, is generally competent and frequently zealous and energetic. The solid citizen of the middle class, with little contact with the law, finding himself accused, must suddenly come up with a substantial fraction of his

annual income -- in advance -- before he can be assured of an attorney who will take his case.

2. The decisions of this Court do not afford any clear definition of the term "indigent", and the rulings of lower courts vary widely with respect to who is or is not indigent.

Under the decisions of this Court, the fact of appointment of counsel for an accused depends largely upon sociological circumstances. If the accused falls into the class determined to be "disadvantaged" or "minority", he is very likely to receive favorable consideration from the courts with respect to his indigency, while if he is among those who are considered traditionally to be of the majority, he will be left to his own resources, meager though they may be. And if this is the case, he may well be

without ". . . the Assistance of Counsel for his defence."

The rulings of this Court, and those of the lower courts, do not provide adequate guidance for those who find themselves accused of crime in this county, whereby they may understand clearly what criteria to apply, and to what they must make oath in order to show indigency. There is no test that men of common understanding may apply to determine the quantum of indigency.

In the case of Shimabuku v. Britton, 357 F. Supp. 825 (D.C. Kans. 1973), the court found that the defendants were not indigent, because they had small sums of money in their prison accounts. Yet when Herman Bell admitted to possessing $4,000 to $5,000 in cash in his home, the court declared him to be indigent. See Appendix, p. A5.

In order to demonstrate some of the difficulty involved with this problem, petitioner asks the following rhetorical questions:

If a person with a total wealth of $100 is accused of a crime, and can only hire an attorney for $150, is he indigent? If not, is he indigent after he pays $100? Or if he has considerably more than $100 in unmarketable realty, but no liquid assets, is he in fact indigent?

These instances show that there is a great confusion respecting the definition and use of the term "indigent". Thus, clarification of the term would be helpful to the lower courts, and to those who may find themselves in that current gray area.

Finally, petitioner urges that it is no more proper to establish a means test for determining who shall have the

benefit of counsel in a criminal action nor to exercise one's right to a defense under the Fifth and Sixth Amendments than it is to establish a means test for voting, or even a filing fee to be a candidate for elections.

Conclusion

For the reasons given here, petitioner respectfully asks that his petition for a writ of certiorari be granted, in order to review the judgment of the Supreme Court of the State of Ohio.

Respectfully submitted,

Arthur L. Cain

CAIN and LOBO
11925 Pearl Road
Cleveland, Ohio 44136

Counsel for Petitioner

Counsel for Parties.

THE STATE, EX REL. WELLS, APPELLANT,
v. HENNESSEY,
JUDGE, APPELLEE.

[Cite as State, ex rel. Wells, v. Hennessey (1974), 37 Ohio St. 2d 37.]

Mandamus - Writ not available, when - No clear legal duty on respondent to do act sought - Appointment of counsel for nonindigent defendant.

(No. 73-730 - Decided January 23, 1974.)

Appeal from the Court of Appeals for Cuyahoga County.

Relator was charged in the Berea Municipal Court with disturbing the peace, a misdemeanor which carries the possibility of imprisonment upon conviction.

After refusing to plead to the charge, and before any procedural steps were taken in the Municipal Court, relator filed a motion for appointment of counsel. Respondent, Judge of the Berea Municipal Court, overruled relator's motion. Relator's appeal to the Court of Appeals from the overruling of that motion was dismissed for the lack of a final appealable order.

Relator then instituted the instant mandamus action in the Court

of Appeals for Cuyahoga County against the Judge of the Berea Municipal Court for an order directing him to appoint counsel to represent relator in the Municipal Court action.

The Court of Appeals denied the writ of mandamus for the reason that the "petition does not state a cause of action for which a writ is allowed."

Relator appeals to this court as a matter of right.

Messrs. Cain & Lobo, Mr. Arthur L. Cain and Mr. Robert Bruce Henn, for appellant.

Mr. H. E. Whitaker, law director, for appellee.

Opinion Per Curiam.

Per Curiam. Relator does not claim to be indigent, nor was any claim of indigency urged before the trial court. His only contention is that, since counsel are appointed for indigent defendants, the denial of appointed counsel to any defendant, regardless of indigency, is a denial of equal protection of the laws.

Relator cites no court decision or any statute which imposes any duty upon a trial judge to appoint counsel for a nonindigent defendant. He has failed to show the existence of any clear legal duty on the part of respondent judge to appoint counsel in this case.

The complaint in mandamus failing

to state any claim upon which the writ of mandamus should issue, the judgment of the Court of Appeals denying the writ is affirmed.

Judgment affirmed.

O'NEILL, C.J., HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN, and P. BROWN, JJ., concur.

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, CUYAHOGA COUNTY

EMIL J. MASGAY, CLERK OF COURTS

STATE OF OHIO, EX REL: FREDDIE L. WELLS
Relator

vs.

JAMES F. HENNESSY (sic)
Respondents

Court of Appeals No. 32915

Lower Court No. Mandamus

Motion No. - -

Date July 20, 1973

JOURNAL ENTRY

Writ of mandamus denied. Petition does not state a cause of action for which a writ is allowed. Exc.

MANOS, C.J.,
JACKSON, J.,
DAY, J. CONCUR.

/s/ John M. Manos
Presiding Judge

JOHN M. MANOS

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8F THE KANSAS CITY TIMES Sept. 3, 1973

MAN ON FBI LIST SEIZED

New Orleans (AP) - Herman Bell, 25, one of the FBI's 10 most wanted fugitives, was captured yesterday on a New Orleans street. Bell, wanted in the killing of two New York policemen, offered no resistance.

Bell, a Negro, went before a U.S. magistrate in New Orleans and was put under a $500,000 bond. The FBI said Bell had been sought in connection with the May 21, 1971, killing of the two police officers, and also with the Sept. 20, 1971, robbery of a branch of the Bank of America in San Francisco.

Bell was arrested by FBI agents, New Orleans police and New York police detectives.

U.S. Magistrate Morey Sear set a removal hearing Sept. 12 at which time Bell could be sent back to New York for trial. Robert Tanenbaum, an assistant district attorney from Manhattan, said he anticipated that extradition proceedings would be started in state court here tomorrow. Both Tanenbaum and Gerald Gallinghouse, a U.S. attorney, of New Orleans asked that Bell be held without bond. Gallinghouse cited the "vicious crimes" involved and said Bell was extremely dangerous.

Sear ruled that Bell was indigent, although Bell said he might have $4,000 to $5,000 in his house. Sear appointed

a New Orleans lawyer, Martin E. Feldman, to represent Bell.

Bell said that he had not worked in the last six months, but had saved money, He gave a New Orleans address as his most recent residence and several San Francisco addresses.

Bell said his only prior conviction was second-degree robbery in Oakland, Calif. He said he had attended Oakland College there for a time.

Tanenbaum said he and three New York detectives had been in New Orleans since Thursday after receiving information a week ago that Bell was in the city.

Bell's wife also was booked by the New Orleans police on charges of harboring a fugitive and possession of stolen property. Their children, Jonas Bell, 2 1/2, and Richard Keith Hanna, a stepson, 5, were in the care of juvenile authorities.

An official said the arrest was the result of an intensive investigation but, declined to give further details.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 1974, three copies of the Petition for Writ of Certiorari were mailed by First-Class United States mail, to

H. E. Whitaker
Law Director
City of Berea
11 Tract Street
Berea, Ohio 44017,

counsel for the respondent. I further certify that all parties required to be served have been served.

Arthur L. Cain

Arthur L. Cain

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11925 Pearl Road
Cleveland, Ohio 44136

Counsel for Petitioner

FILE COPY

Supreme Court, U. S.
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Berea, Ohio, Municipal Court

Respondent

RESPONDENT'S ANSWER BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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372 U.S. 335 (1963). 6

United States ex rel. Alaska Smokeless Coal Co. v. Lane
250 U.S. 549, 555 (1919) 3

Will v. United States
389 U.S. 90, 96 (1967) 4

Statement of the Case

Respondent agrees substantially with the Statement of the Case as set forth in the Petitioner's brief before this Honorable Court with one addition.

At no time during the entire course of this proceeding has petitioner made any claim of indigency. In fact, on several occasions, including before the Supreme Court of Ohio, petitioner has admitted he is not indigent.

BRIEF OF THE RESPONDENT

This Case is in Mandamus

Prior to discussing petitioner's alleged right to appointed counsel, it is important to point out that the case at hand is one in mandamus. Even though this fact is a pivotal point as evidenced by the Ohio Supreme Court's decision in this matter, Pl. A. 1., petitioner has failed to even mention this significant factor in his argument.

An ancient writ in common law used to compel public officials to perform their duties, mandamus is also the subject of state statutes in Ohio, Chapter 2731, Ohio Revised Code. Because it is a writ which compels action, mandamus has some very strict elements. Primary is the requirement that the duty be one specially

enjoined by law. O.R.C. §2731.01. Second, it can compel a court to exercise its judgment, or proceed to the discharge of its functions, but it can never control judicial discretion. O.R.C. §2731.03. This Honorable Court has in the past spoken directly to both these ideas.

"In Ohio, mandamus is an extra-ordinary remedy, available to a petitioner only on a showing of a clear legal right." Brockington v. Rhodes, 396 U.S. 41 (1969).

"But where there is discretion . . . even though its conclusion be disputable, it is impregnable to mandamus." United States ex rel. Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549, 555 (1919).

"And the party seeking mandamus 'has the burden of showing that its right to issuance of the writ is clear and

indisputable.' " Will v. United States, 389 U.S. 90, 96 (1967), citing Banker's Life and Casualty Co. v. Holland, 346 U.S. 379, 384 (1953).

Applying both these ideas to petitioner's argument it becomes fatally defective. Nowhere in either case law or statutes is it the duty of a trial court judge to appoint counsel for one not of indigent status. Petitioner's attorney even admitted in oral argument to the Ohio Supreme Court that his research disclosed no legal duty on the respondent. Absent this duty it becomes virtually impossible for petitioner to meet his burden of showing a "clear and indisputable" right. Respondent was merely exercising his discretion in refusing to appoint an attorney and even though petitioner disputes the

basis of that discretion "it is impregnable to mandamus."

Consequently, mandamus is clearly unavailable as a remedy to the petitioner as the Supreme Court of Ohio succinctly pointed out in its short per curiam opinion.

Response to Petitioner's Questions No. 1 and 2

Regarding petitioner's Question No. 1, it is abundantly clear through the wording of the Sixth Amendment to the United States Constitution that an accused in a criminal prosecution has the right to "assistance of counsel for his defense." History clearly reflects the basis upon which our Constitution is structured and the reason for the first ten amendments to the Constitution. These amendments serve as a safeguard to prevent an oppressive government from denying any

citizen of certain inalienable rights. Granted the Sixth Amendment and the right to counsel is an inalienable right and no government should deny that right. This right has been clearly enumerated through Argersinger v. Hamlin, 407 U.S. 25 (1972), and Gideon v. Wainwright, 372 U.S. 335 (1963). However, these decisions stand for one overwhelming concept. Indigents, because of their inability to pay, are being denied the inalienable right to counsel at a criminal proceeding.

There is no denial of counsel in the case at hand. Petitioner freely admits he is not indigent, consequently, the state is not denying him the right to counsel by not appointing same. He is denying himself the right, not because of inability but by choice.

Therefore, it is clear through

Argersinger, Gideon and the Constitution that the criteria for appointing counsel is based on a test which determines whether the accused is being denied counsel by the state because of indigency.

Because this Honorable Court has established acceptable criteria by distinguishing between indigency and those having sufficient means, the question turns to what is indigency, not whether or not one who has not sought to establish indigency is entitled to counsel. Moreover, by choosing not to claim indigency, petitioner in effect lacks the legal standing to ask the court to establish indigency guidelines, making both questions presented by petitioner inapplicable to the matter at hand.

Appointed Counsel for all Accused Not A Requirement for Equality Under the Law

Practically speaking, requiring the state to provide counsel for every accused would put a tremendous tax burden on the citizens of this country; taxes which would undoubtedly not be approved by the American voters. Where would all these funds come from? States and their sub-divisions would be insolvent within a very short time. The financial question was discussed by this Honorable Court in Argerslinger v. Hamlin, 407 U.S. 25 (1972) and that was simply for indigent defendants. Requiring state-paid counsel for non-indigents would put an impossible burden on state resources.

Petitioner attacks the failure to appoint counsel as a denial of equal protection as enumerated in the

Fourteenth Amendment. To stretch his argument further the State should provide payments to all since some welfare recipients are being paid! Maybe everyone should receive food stamps since the truly needy are receiving a preference! In effect, everyone would get a monthly check. And who would pay for it? The taxpayer. Hardly the system upon which this country has prospered for almost 200 years. The Government's duty is to treat all fairly and not deny rights which are inherent in our society. Treating all Americans exactly alike is not synonymous with guarantying constitutional rights to be enjoyed by all in a uniform application to each.

Granted, being forced to face criminal charges is an unfortunate

and serious plight. However, the law provides remedies such as malicious prosecution and false arrest to prevent false charges being arbitrarily brought against an individual, necessitating his employment of counsel, the cost of such counsel being recoverable.

In conclusion, petitioner's appeal is not well founded. First, because a cause of action in mandamus has not been shown. Secondly, failure to appoint counsel has not resulted in a denial of any right due the petitioner.

Respectfully submitted,

H. E. Whitaker
Law Director
City of Berea
11 Tract Street
Berea, Ohio 44017

Counsel for Respondent

APPENDIX

Ohio Revised Code §2731.01 3

Mandamus defined.

Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

Ohio Revised Code §2731.03 3

Writ does not control judicial discretion.

The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 1974, three copies of Respondent's Answer Brief to Petition for a Writ of Certiorari were mailed by First Class United States mail to:

Arthur L. Cain
CAIN and LOBO
11925 Pearl Road
Cleveland, Ohio 44136,

counsel for the petitioner. I further certify that all parties required to be served have been served.

H. E. WHITAKER
Law Director
City of Berea
11 Tract Street
Berea, Ohio 44017

Counsel for Respondent